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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

EDWARD J. KING,
GOVERNOR OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Appellants

v.

PRETERM, INC.,

Appellees

On Appeal from the United States Court
of Appeals for the First Circuit

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Governor of the Commonwealth of Massachusetts, its Secretary of Administration and Finance, its Secretary of Human Services, and its Commissioner of Public Welfare (the state officials) submit this statement in support of their appeal from a final decision and order of the United States Court of Appeals for the First Circuit holding two state statutes governing the reimbursement of costs related to the performance of abortions under the Commonwealth's program of medical assistance to be in conflict with provisions of title XIX of the Social Security Act

and enjoining the statutes' enforcement. The state officials contend that the Court of Appeals's decision incorrectly interprets § 1902(a)(17) of the Act, 42 U.S.C. § 1396a(a)(17) (1976), and that their appeal presents substantial questions concerning the proper relationship between state and federal government within the Social Security Act's "scheme of cooperative federalism." These questions are of such significance that they warrant this Court's plenary consideraton.

Opinions Below

The District Court's original decision enjoining the enforcement of Massachusetts St. 1978, ch. 367, § 2, Item 4402-5000, on a preliminary basis is reported sub nom. Jaffe v. Sharp at 463 F. Supp. 222 (D. Mass. 1978). The District Court's order of September 6, 1978, allowing consolidation of the hearing upon plaintiffs' motions for preliminary injunctions with the merits pursuant to Fed.R.Civ.P. 65(a)(2) and for the entry of a final order is unreported and reproduced in the Appendix. The Court of Appeals's order of August 7, 1978, granting an injunction pending appeal of wider scope than the District Court's preliminary injunction is unreported and reproduced in the Appendix. The Court of Appeals' decision of January

15, 1979, on the merits of the statutory claims is reported at 591 F.2d 121 (1st Cir. 1979), and, pursuant to this Court's rules, is reproduced in the Appendix. Finally, the Court of Appeals' order of August 2, 1979, modifying its judgment entered on January 15, 1979, and its order of August 7, 1978, is unreported and reproduced in the Appendix.

Jurisdiction

The state officials appeal from a series of orders which the Court of Appeals entered at various times during the course of its consideration first of appeals from the District Court's action on plaintiffs' motions for preliminary injunctive relief, then upon final review of the District Court's judgment on plaintiffs' statutory claims, and, finally, upon plaintiffs' request for further relief following the enactment of new legislation.[1/] In

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1/ As a technical matter, the state officials appeal from the Court of Appeals' order of August 2, 1979, which amended its judgment entered January 15, 1978, and its order of August 7, 1978. Since the basis of all of these orders is the same, i.e., the conclusion that the challenged state statutes conflict with the requirements of

(footnote continued)

summary, plaintiffs' complaints in the District Court claimed that the Commonwealth's statutory restrictions on the reimbursement of health care provider costs incurred to provide abortion services to Medicaid recipients are invalid because they conflict with title XIX of the Social Security Act. Asserting jurisdiction under 28 U.S.C. §§1331 and 1343 (1976), plaintiffs sought

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1/ continued

title XIX, and since the court below modified each of its earlier orders on August 2, 1979, the state officials' notice of appeal, reproduced in the Appendix, gives notice of their appeal from all three orders.

One other technical point concerning this Court's jurisdiction deserves mention. While the District Court entered a "final judgment" on September 6, 1978 (reproduced in the Appendix), this judgment does not conform to Fed.R.Civ.P. 54(b)'s provision that:

> the Court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer

(footnote continued)

preliminary injunctive relief against enforcement of the first statute, relief which the District Court granted in part on July 28, 1978. The District Court's opinion is reported at 463 F. Supp. 222 (D. Mass. 1978). Plaintiffs and the state officials appealed to the Court of Appeals both from the preliminary injunction of July 28, 1978, and the District Court's "final judgment" of September 6,

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1/ continued

> than all of the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Despite this technical flaw, it is clear that the Court of Appeals and the parties have treated the District Court's judgment on the statutory issues as if it were a final one. This course is consistent with the preferable practice, Hagans v. Levine, 415 U.S. 528 (1974), but it has had the effect of requiring the state officials to note their appeal from the lower court's decision on the statutory claims before the case is fully adjudicated. The continuing nature of the controversy in the District Court, which now concentrates on plaintiffs' constitutional claims, prompted the state officials to apply to the Circuit Justice for leave to postpone filing this jurisdictional statement until the District Court had entered its judgment on the constitutional issues. See

(footnote continued)

1978, and that court filed its opinion and entered an order affirming the District Court's "final judgment" in pertinent part on January 15, 1978. The Court of Appeals' opinion is reported at 591 F.2d 121 (1st Cir. 1979) and is reproduced in the Appendix. The Court of Appeals denied plaintiffs petition for a rehearing on February 2, 1979, and modified its judgment of January 15, 1979, by order of August 2, 1979. Copies of both of these orders are included in the Appendix. The state officials filed their notice of appeal in the Court of Appeals on August 20, 1979, and a copy of this notice is also reproduced in the Appendix.

The state officials have claimed their appeal to this Court pursuant to 28 U.S.C. §1254(2)(1976). Cases which

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1/ continued

Respondents-Appellants' Motion for an Order Permitting Postponement of further Appellate Proceedings until the District Court Enters Final Judgment (Application No. A-323, dated October 3, 1979). While the state officials continue to believe that the most efficient way of proceeding is for this Court to exercise its appellate jurisdiction in this case at one time and as to all issues, they are filing this jurisdictional statement in compliance with the Circuit Justice's order which extended the period of time in which the state officials might file rather than postponing filing until the District Court entered final judgment. See order filed October 16, 1979.

the state officials believe sustain this Court's jurisdiction are Quern v. Zbaraz, 469 F. Supp. 1212 (N.D. Ill. 1979), appeal dock'td 48 U.S.L.W. 3126 (July 2, 1979), juris. post., 48 U.S.L.W. 3356 (Nov. 26, 1979); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Poelker v. Doe, 432 U.S. 519 (1977); and Rosado v. Wyman, 397 U.S. 397 (1970).

Statutes Involved

The Court of Appeals determined that two Massachusetts statutes governing the reimbursement of the costs of abortion surgery under the Commonwealth's Medicaid program are invalid because they conflict with provisions of title XIX of the Social Security Act. The first statute, St. 1978, ch. 367, § 2, Item 4402-5000, provides that:

> SECTION 1.
>
> To provide for the maintenance of the several departments, boards, commissions and institutions, of sundry other services, and for certain permanent improvements, and to meet certain requirements of law, the sums set forth in section two, for the several purposes and subject to the conditions specified in

said section two, are hereby appropriated from the General Fund unless specifically designated otherwise in the item, subject to the provisions of law regulating the disbursement of public funds and the approval thereof for the fiscal year ending June thirtieth, nineteen hundred and seventy-nine, in this act referred to as the year nineteen hundred and seventy-nine, or for such period as may be specified.

SECTION 2.

* * *

DEPARTMENT OF PUBLIC WELFARE.

4402-5000

For a medical assistance program;...and provided, further that no funds appropriated under this item shall be expended for the payment of abortions not necessary to prevent the death of the mother. This provision does not prohibit payment for medical procedures necessary for the prompt treatment of the victims of forced rape or incest if such rape or incest is reported to a licensed hospital or law enforcement agency within thirty days after said incident....

The second statute is St. 1979, ch. 393:

SECTION 1.

To provide for the maintenance of the several departments, boards, commissions and institutions, of sundry other services, and for certain permanent improvements, and to meet certain requirements of law, the sums set forth in section two, for the several purposes and subject to the conditions specified in said section two, are hereby appropriated from the General Fund unless specifically designated otherwise in the item, subject to the provisions of law regulating the disbursement of public funds and the approval thereof for the fiscal year ending June thirtieth, nineteen hundred and eighty, in this act referred to as the year nineteen hundred and eighty, or for such period as may be specified.

SECTION 2.

* * *

4402-5000

For a medical assistance program;...and provided, further that no funds appropriated under this item shall be expended for the payment of abortions not necessary to prevent the death of the mother....

Questions Presented

1. Whether St. 1978, ch. 367, § 2, Item 4402-5000, and St. 1979, ch. 363, § 2, Item 4402-5000, which impose restrictions upon the reimbursement of health care provider costs incurred to provide abortion services to Medicaid recipients, are inconsistent on their face with certain provisions of title XIX of the Social Security Act, 42 U.S.C. § 1396a (1976), and certain regulations promulgated under it.

2. Whether an injunction prohibiting the enforcement of the challenged statutes is proper in light of the voluntary nature of a state's participation in the program of medical assistance authorized by title XIX of the Social Security Act and this Court's decision in Rosado v. Wyman, 397 U.S. 397 (1970).

Statement Of The Case And Summary Of Prior Proceedings

Two separate groups of plaintiffs commenced separate civil actions in the District Court in July, 1978. The first, originally captioned Baird v. Sharp, was filed on July 12, 1978; the second, Preterm v. Dukakis, was filed a day later and assigned as a related case. Although never formerly consolidated in the District Court, these two actions

were heard and decided together. As set forth in the complaints, the various plaintiffs claimed that the Commonwealth's statutory restrictions on the reimbursement of costs incurred by health care providers related to the provision of abortion services to Medicaid recipients are in conflict with provisions of title XIX of the Social Security Act which, plaintiffs maintained, require participating states to reimburse all costs related to the provision of "medically necessary services."[2/] In addition to this primary statutory claim, plaintiffs alleged that the statutes were unconstitutional because they violate the equal protection clause of the Fourteenth Amendment and work an impermissible intrusion upon the physician-patient relationship contrary to the protections afforded Medicaid recipients by the Ninth and Fourteenth Amendments. Plaintiffs' motions for temporary restraining orders became moot as a result of the state officials' determination to delay implementation of the statutory restrictions pending the promulgation of regulations and the notification of Medicaid providers and recipients. The District Court did, however, hold a hearing on plaintiffs' motions for preliminary injunctive relief and, on July 28, 1978, entered an order enjoining the state officials from implementing St. 1978, ch. 367, § 2, to the extent to which it prohibited the

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2/ The Baird plaintiffs sought reimbursement for the costs of "elective" procedures as well.

expenditure of state funds to reimburse participating health care providers for costs related to the performance of abortion surgery and in which federal financial participation was available under the terms of the so-called "Hyde Amendment," Pub. L. 95-205, §101, 91 Stat. 1460 (Dec. 9, 1977). Jaffe v. Sharp, 463 F. Supp. 222, 230 (D. Mass. 1978).[3/] All the plaintiffs and the defendant state

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3/ The "Hyde Amendment" in effect during the proceedings in the District Court, Pub. L. 95-205, § 101, 91 Stat. 1460 (Dec. 9, 1977), is a limitation on appropriations for the Department of Health, Education, and Welfare and provides in pertinent part that:

> provided, That none of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.
>
> Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.
>
> The Secretary shall promptly issue regulations and establish procedures to ensure that the provisions of this section are rigorously enforced.

officials appealed from the District Court's order. The plaintiffs in Preterm sought an expanded injunction pending appeal, and the Court of Appeals entered an order on August 7, 1978, requiring the state officials to reimburse health care providers participating in the Commonwealth's Medicaid program for costs related to the provision of abortion services provided to "all Medicaid-eligible pregnant women who desire to obtain an abortion and for whom a physician has determined that an abortion is a medically-necessary service." Preterm, Inc. v. Dukakis, 591 F.2d 121, 123-24 (1st Cir. 1979). On September 7, 1978, the District Court upon motion consolidated its consideration of plaintiffs' motions for preliminary injunctive relief with the merits and entered its preliminary injunction as a final order. All parties again appealed, and the Court of Appeals ordered an accelerated schedule for briefing and argument. Confining itself, as had the District Court, to the statutory issues, see Hagans v. Levine, 415 U.S. 528 (1974), the Court of Appeals filed its opinion and entered its judgment affirming the Distict Court's order in pertinent part.[4/] Following the Court of

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4/ The District Court had dismissed certain plaintiffs in the Baird v. Sharp proceeding for lack of standing. The Court of Appeals reversed this portion of the District Court's order on procedural grounds. 591 F.2d at 138.

Appeals' decision, the plaintiffs in Parents' Aid Society, Inc. v. Sharp (Baird v. Sharp in the District Court) moved that the court stay the issuance of its mandate and continue its August 7, 1978, injunction pending the filing of a petition for certiorari in this Court. The Court of Appeals granted this motion on January 29, 1979, and denied the Preterm plaintiffs' motion for a rehearing on February 2, 1979. This Court denied the plaintiffs' petitions for certiorari on May 14, 1979, and the Circuit Justice granted the Preterm petitioners' application for suspension of the Court's order denying certiorari on May 18, 1979. The Preterm plaintiffs next filed a motion in the Court of Appeals seeking modification of its injunction pending appeal of August 7, 1978, as continued in effect by its order of January 29, 1979, to enjoin the enforcement of Stat. 1979, ch. 268, § 1, and the Court of Appeals entered an order on June 21, 1979, requiring the state officials to show cause why the relief the Preterm plaintiffs sought should not be granted. The state officials filed their response, and the Court of Appeals then entered another order on July 26, 1979, requesting the state officials to respond to the Preterm plaintiffs' request for further relief against Stat. 1979, ch. 393, § 2, Item 4402-5000. After receiving the state officials' response, the Court of Appeals entered an order on

August 2, 1979, modifying its judgment of January 15, 1979, to enjoin the implementation of Stat. 1979, ch. 393, § 2, Item 4402-5000, "insofar as it prohibits state reimbursement for abortions which would qualify for federal reimbursement under the terms of the Hyde Amendment." The Court of Appeals in the same order also amended its order of August 7, 1978, to include Stat. 1979, ch. 393, § 2, Item 4402-5000, within the scope of that earlier order. On August 20, 1979, the state officials filed their notice of appeal from the court's order of August 2, 1979, and its prior orders of January 15, 1979, and August 7, 1978, as modified by the August 2nd order. This Court denied the Preterm plaintiffs' petition for rehearing on their petition for certiorari on October 1, 1979, and the Court of Appeals issued its mandate on October 10, 1979.

Proceedings relating to the statutory claims in this case have now reached a conclusion in the lower courts. While the state officials have sought to postpone further proceedings in this Court pending the disposition of the remaining constitutional claims below, the Court certainly may exercise its appellate jurisdiction at this point, for, as the state officials demonstrate in the following section, the questions which the Court of Appeals' decision presents are of national importance and central to the relationship under the Social Security Act of the federal and state governments.

The Questions Are Substantial

Over the past ten years, this Court and the lower federal courts have frequently been called upon to interpret various provisions of the Social Security Act. On occasion, this Court has also found its necessary to criticize the lower federal courts for approaching their interpretive task in Social Security Act cases more with an eye toward judicial perceptions of social welfare than one focused solely on the intent of Congress. E.g., Quern v. Mandley, 436 U.S. 725, 741 (1978); see Burns v. Alcala, 420 U.S. 575, 580 (1975). The current controversy over title XIX's requirements regarding "medically necessary services," of which this case and similar abortion cases are only one example, demonstrates that this criticism has yet to be fully effective, for common to most decisions involving the "medically necessary" issue is insufficient attention to the complexities of statutory interpretation involved and a continued willingness to substitute judicial policy judgments for those of the Congress and the state and federal officials charged with responsibility for administering the national program of medical assistance which title XIX authorizes. In addition, the lower federal courts tend to neglect this Court's examples of the proper approach to requiring state officials to remedy non-conformities between state plans for public assistance and the Social Security Act's

requirements. The state officials argue in the following paragraphs that the Court of Appeals, while avoiding some of the errors of other lower federal courts in interpreting the requirements of title XIX, improperly concluded in this case that title XIX prohibits the Commonwealth from limiting the availability of reimbursement under its Medicaid program to costs associated with the performance of only certain abortion procedures and that an injunction absolute on its face requiring the reimbursement of all "medically necessary" abortion surgery costs is a proper remedy for the non-conformity of the Commonwealth's state plan. These determinations raise substantial questions which warrant this Court's plenary consideration.

I. THIS COURT SHOULD REVIEW THE DETERMINATION OF THE COURT OF APPEALS THAT THE COMMONWEALTH'S LIMITATIONS ON THE REIMBURSEMENT OF ABORTION COSTS ARE UNREASONABLE AND INCONSISTENT WITH THE OBJECTIVES OF TITLE XIX.

Unlike many of the other lower federal courts which have considered the "medically necessary" issue, the Court of Appeals in this case rejected the argument that title XIX requires participating states to provide reimbursement of all participating health care provider costs incurred to provide "medically necessary" services.

591 F.2d at 124-25. The Court of Appeals' decision on this point is correct, and the state officials do not question it. However, while avoiding the pitfalls which uncritical transpositions of language create,[5/] the Court of Appeals went on to conclude that certain statutory and regulatory provisions governing the amount, duration, and scope of benefits which a state may offer under its Medicaid program prohibit the Commonwealth from imposing the restrictions on abortion cost reimbursement which the challenged statutes were designed to work. In essence, the Court of Appeals concluded on the basis of the extremely limited factual record compiled at the preliminary injunction hearing that "it [is] 'unreasonable' and wholly '[in] consistent with the objectives of the Act', 42 U.S.C. § 1396a(a)(17), for a state to provide abortion services and then, with limited exceptions for victims of rape and incest, deny them to all those who will not die without it [sic]." 591 F.2d at

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5/ The District Court was not as agile and made the mistake of inferring from the phrase "necessary medical services" which appears in title XIX's appropriations section (its "01" section) that the Congress intended to impose an obligation in the statute's "02" section upon the states to reimburse all costs incurred for "medically necessary services." Jaffe v. Sharp, 463 F. Supp. 222, 228-29 (D. Mass. 1978), aff'd on oth'r gr'nds sub nom. Preterm v. Dukakis, 591 F.2d 121, 126-27 (1st Cir. 1979).

126. The explanation of this conclusion is based not upon a close analysis of the legislative history of § 1396a(a)(17) or of HEW's purposes in promulgating its regulation dealing with limitations on benefits (42 C.F.R. § 440.230 (1978)).[6/] Rather, the court below simply expressed its intellectual puzzlement, 591 F.2d at 126, and, without citing any authority whatsoever, concluded that the challenged statute is inconsistent with title XIX's provisions.[7/]

The state officials submit that the Court of Appeals' intuitive reliance upon § 1396a(a)(17) and 42 C.F.R. § 440.230 (1978) is another unfortunate example of a lower federal court's willingness to interpret the Social Security

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6/ Indeed, the Court of Appeals neglected to note that the version of this regulation upon which it relies in its opinion was amended prior to decision precisely because inadvertent alterations in its wording during recodification had led to confusion over its effect upon a state's authority "to decide what medical aasistance will be covered under the State Medicaid plan." 43 F.R. 57253 (Dec. 7, 1978).

7/ The court also concluded that the statute impermissibly circumscribes physician judgment. Again, the court cites no authority for the proposition that a state may not place limits on physician decision-making, even assuming, as the state officials of course do not, that a limitation on Medicaid benefits may be thought to impose a restriction on physician decision-making.

Act on the basis of generalities and imprecise analysis. Without commencing an extensive discussion, the state officials point out that the key provision of § 1396a(a)(17), i.e., its requirement of "reasonable standards... for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this title...," is derived from the Kerr-Mills amendments to title I of the Social Security Act, 74 Stat. 924.[8/] Further, the legislative history of § 1396a(a)(17), both its own and that of its predecessor in Kerr-Mills, provides no support for the Court of Appeals' conclusion.[9/]

8/ Kerr-Mills provided that: "(11)(D) include reasonable standards, consistent with the objectives of this title, for determining eligibility and the extent of such assistance...."

9/ The Senate Finance Committee's comments on the Kerr-Mills provision were as follows:

Medical Assistance for the Aged
Receiving Old-Age Assistance

* * *

3. Eligibility.

Each state has the responsibility of determining the standard of eligibility for the medical care

(footnote continued)

The truly remarkable learning one gains from reviewing § 1396a(a)(17)'s legislative history is that the Congress intended its provisions to deal primarily with

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9/ continued

it provides to aged persons. For aged persons receiving money payments the State must take into consideration any income and resources of the individual.

4. Scope of Medical Services.

There is no federal limitation on medical services provided under the bill. Each state may determine for itself the scope of medical services to be provided in the program.

Medical Assistance for the Aged Not
Receiving Old-Age Assistance
[Medically Needy]

1. Purpose.

* * *

A State would have broad latitude in determining eligibility for benefits under the program as well as the scope and nature of the services to be provided within the limitations described below....

* * *

2. Eligibility.

* * *

(footnote continued)

issues of eligibility, not benefits, for Congress recognized that, under the Act, benefits determinations have always been primarily the states' responsibility. Therefore, the Court of Appeals should have acknowledged that, since the Commonwealth's limitations on abortion

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9/ continued

> The State has wide latitude to establish the standard of need for medical assistance as long as it is a reasonable standard consistent with the objectives of this title....
>
> 3. Scope of Benefits.
>
> The scope of medical benefits and services provided will be determined by the States....

Sen. Rept. No. 1856, reprinted in 2 U.S. Code Cong. & Admin. News 3610-14 (1960) [emphasis supplied].

When Congress enacted title XIX in 1965, it described its intentions concerning § 1396a(a)(17) as follows:

> (d) Determination of need for medical assistance.
>
> The committee bill would make more explicit a provision now in the law that in determining eligibility for and extent of aid under the plan, States must use reasonable standards consistent with the objectives of the titles. Although states may set a limitation on income and resources which individuals may hold and be

(footnote continued)

reimbursement affect benefits, and not eligibility, § 1396a(a)(17) is inapplicable to the "medically necessary" issue.

9/ continued

> eligible for aid, they must do so by maintaining a comparability among the various categorical groups of needy people. Whatever level of financial eligibility the state determines to be that which is applicable to the needy aged, for example, shall be comparable to that which the State sets to determine the eligibility for the needy blind and disabled; and must also have a comparability to the standards used to determine the eligibility of those who are to receive medical assistance as needy children and the parents or relatives caring for them....
> The bill also contains a provision designed to correct one of the weaknesses identified in the medical assistance for the aged program [title I, as amended by Kerr-Mills]. Under the current provisions of Federal Law some States have enacted programs which contain a cutoff point on income which determines the financial eligibility of the individual.... In order that the States shall be flexible in the consideration of an individual's income, the committee requires that the State's standards for determining eligibility for and the extent of medical assistance shall take into account, except to the extent prescribed by the Secretary, the cost...incurred for medical care or any other type of remedial care recognized under State law... [emphasis supplied].

Sen. Rept. No. 404, reprinted in 1 U.S. Code Cong. & Admin. News 1943, 2018-19 (1965).

Similarily, 42 C.F.R. § 440.230 (1978) does not support the judgment below. This regulation imposes only three requirements upon participating states: a state plan for medical assistance must "(a)...specify the amount and duration of each service that it provides"; if a state plan includes a "service," "[e]ach service must be sufficient in amount, duration, and scope to reasonably achieve its purpose"; and "[t]he medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition."[10/] 42 C.F.R. § 440.230 (1978), as amended by 43 F.R. 57253 (Dec. 7, 1978). The regulation's first requirement is merely a formal one designed to prescribe the minimal written content of a state plan for medical assistance. The second requirement imposes what is best considered an anti-waste restriction: if a state includes a "service," it must include it to a sufficient extent to assure that the "service" "reasonably achieve[s] its purpose." For example, if a state includes benefits for inpatient hospital services related to the treatment of infectious

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10/ However, a state "agency may place appropriate limits on a service based upon such criteria as medical necessity or on utilization control procedures."

disease, it cannot make these benefits so minimal (say, limited to two days of hospitalization) that few if any patients could be expected to recover from their illness before they would have to be discharged or begin paying for additional hospital stay days themselves. For obvious reasons, such a benefit would have little value to a recipient and might promote highly undesirable provider attitudes, contrary to Congress's explicit desires.

Finally, the third requirement is by its very terms designed solely to prevent states from denying benefits to a specific individual—already otherwise determined to be eligible for medical assistance—because of the individual's particular medical situation. Thus a state may not include a provision in its state plan which purports to authorize a social worker to deny benefits to a Medicaid recipient simply because the recipient needs, say, extensive thoracic surgery entailing a long hospital stay and post-operative recovery in a skilled nursing facility for several months, assuming, of course, that thoracic surgery in general is a "required service" included in the state plan. Simply put, this requirement has no applicability to a state plan provision which properly removes from the list of "services" (or properly limits the availability of) a specific type of surgical service, thus precluding providers of health care services from seeking reimbursement from the state for the cost of any (or

some) such services which they provide to all Medicaid recipients. Such a future-oriented, across-the-board elimination of a "service" from a state plan for medical assistance is in all respects consistent with Congressional intent.

The state officials submit that the Court of Appeals' failure to apprehend Congress's purpose in enacting § 1396a(a)(17) and HEW's intention in promulgating 42 C.F.R. § 440.230 (1978) is a substantial error which, left uncorrected, would significantly and adversely limit the states' discretion to adjust the benefits of their Medicaid programs. Thus, the court's conclusion that these provisions prohibit the Commonwealth from enforcing its challenged statutes presents a substantial question which this Court should consider on the basis of full briefing and oral argument.

II. THIS COURT SHOULD DETERMINE WHETHER THE COURT OF APPEALS ACTED PROPERLY IN AFFIRMING AN ABSOLUTE INJUNCTION RATHER THAN OFFERING THE COMMONWEALTH THE ALTERNATIVES OF EITHER CORRECTING NON-CONFORMITIES OR CEASING TO EXPEND FEDERAL FUNDS.

Both the District Court and the Court of Appeals granted relief in the nature of a permanent injunction against the state officials prohibiting them from

enforcing the challenged statute to the extent to which they are more restrictive than their federal counterpart, the so-called "Hyde Amendment." 591 F.2d at 134; 463 F.Supp at 230. The granting of this type of relief also led the Court of Appeals to inquire whether the state officials had placed themselves in contempt of court, see Appendix, order dated June 21, 1979, by performing their obligations under state law. Although the state officials pointed out to the Court of Appeals that such relief is both inappropriate and unwarranted, the court maintained its position on remedy and extended its original judgment to enjoin the enforcement of more recent state legislation. Appendix, order dated August 2, 1979.

In Rosado v. Wyman, 397 U.S. 397 (1970), this Court had occasion to consider the nature of the remedy which a federal court might grant in a case in which a state plan for public assistance under the Social Security Act was held to conflict with the Act's requirements. Mr. Justice Harlan, writing for the Court, explained that an "unarticulated premise" of any such remedy, given the Social Security Act's operation as a "system of cooperative federalism," is that a state should have "alternative choices of assuming the additional cost of paying benefits [in accordance with federal requirements] or not using federal funds to pay welfare benefits

according to a plan [which is] inconsistent with federal requirements." 397 U.S. at 420-21. Indeed, in Rosado the Court concluded that the substantial nature of New York's non-conformity required remand "to the District Court to fix a date that will afford New York an opportunity to revise its program in accordance with the requirements of § 402(a)(23) if the State wishes to do so. The District Court shall retain jurisdiction to review, taking in to account the views of HEW should it care to offer its recommendations, any revised program adopted by the State, or, should New York chose not to submit a revamped program by the determined date, issue its order restraining the use of federal monies pursuant to the present statute." Id. at 421-22.

The state officials submit that the remedy model prescribed in Rosado is the one which the Court of Appeals should have adopted in this case and that the court should not have upheld, much less enlarged, the District Court's absolute injunction, but rather given the state officials an opportunity to choose between amending state law provisions to permit administration of the Commonwealth's Medicaid program in conformity with federal law or suffer the entry of an injunction prohibiting the further expenditure of federal funds for medical assistance. This distinction in remedy is hardly

one without a difference,[11/] and the state officials are entitled to an order which respects these differences. The Court of Appeals' failure to adopt the Rosado remedy model raises a substantial question of procedure and statutory interpretation which warrants this Court's plenary consideration.

11/ Not only is it unseemly for the Governor of the Commonwealth and other state officials to be threatened with contempt, but there are also basic state and federal law differences between the expenditure of state funds to reimburse health care providers participating in the Commonwealth's Medicaid program for incurred costs and the receipt and use of federal funds on a quarterly basis as federal financial participation in expenses incurred as medical assistance under the state's approved plan. See Mass. Gen. Laws Ann. ch. 118E, § 3 (West Supp. 1979); 42 U.S.C. § 1396b (1976). Among other things, expenditures of state funds and the reciept of federal financial participation in such expenditures are distinct events often widely separated in time. In addition, the broad injunctions issued by the courts below pay no attention to the question of whether the Congress or the Secretary of HEW would have desired such a severe sanction to be imposed. See 42 U.S.C. § 1396c (1976) (in case of plan or administrative non-conformity, Secretary has discretion either to withhold further payments or limit payments to categories under or parts of state plan not affected by non-conformity).

CONCLUSION

For the reasons set forth above, the Court should note probable jurisdiction of the state officials' appeal and set the case for argument.

Respectfully submitted,

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